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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 373.

CHARLOTTE CROSS JUST AND ANNE ELISE GRUNER, PETITIONERS AND APPELLEES BELOW,

VS.

ALMA CHAMBERS, AS EXECUTRIX OF THE ESTATE OF HENRY C. YEISER, JR., AS OWNER OF THE AMERICAN YACHT "FRIENDSHIP II," RESPONDENT AND APPELLANT BELOW.

SUPPLEMENTAL BRIEF OF PETITIONERS ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Proctors for Petitioners.

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I.

THE OPINIONS OF THE COURTS BELOW.

The opinions (majority and dissenting) of the Circuit Court of Appeals for the Fifth Circuit are reported in *The Friendship II, Chambers* v. *Just et al.*, (June 21, 1940) 113 F. 2d 105. They also appear at pages 863 to 873 of the record.

The opinion of the District Court, though not officially reported, appears at pages 819 to 824 of the record, while the decree of that court containing findings of fact and conclusions of law is found at pages 825 to 835 of the record.

II.

JURISDICTION.

A full statement of jurisdiction has been given under the heading "B" in the petition (pp. 4-5) which is here adopted and made a part of this brief.

III.

STATEMENT OF THE CASE.

This is a proceeding in admiralty brought by the executrix of the Estate of Henry C. Yeiser, Jr., deceased, to secure a limitation of or exoneration from liability for personal injuries due to carbon monoxide gas poisoning occurring on board the houseboat yacht "Friendship II," owned at the time by Yeiser (R. 1-5, 863). The case is before this Court on certiorari to review that part of a judgment of the Circuit Court of Appeals for the Fifth Circuit which reversed the decree of the District Court in so far as the District Court held that the liability of Yeiser *in personam* survived his death.

Yeiser was an engineer (R. 98), a balloon pilot, a licensed airplane pilot, had made a study of boats, had owned several, had studied navigation, was studying to get a Master's license and had a knowledge of gasoline motors (R. 102). Prior to his purchase of the houseboat, holes had been discovered in the exhaust pipe (R. 773). He was told by the Captain then aboard the vessel that the port exhaust pipe should be renewed (R. 730, 749, 759, 865). After buying the boat, Yeiser experienced trouble because of exhaust gas (R. 435, 456, 532, 576, 578). While aware of the danger from the gas (R. 576, 579), he assumed that it was blowing in over the

stern. Twice before the trip on which petitioners were injured, to Yeiser's knowledge (R. 865, 457, 576), persons aboard the vessel had been affected by carbon monoxide gas. On the last occasion, his two sons were overcome while in the same stateroom he later assigned to the petitioners (R. 434, 455, 456, 531, 532, 573, 865). Yeiser was aboard at the time (R. 457) and knew of that occurrence (R. 576). He was fully aware of the danger from carbon monoxide gas and of the dangerous condition existing in that stateroom due to the tendency of the gas to enter therein. He also knew of the likelihood of such gas continuing to enter that stateroom and that it constituted a dangerous condition (R. 435, 461, 462, 578, 579, 865). He lived aboard (R. 61, 455), occupying a stateroom on the upper deck (R. 60), and the boat and crew were at all times under his immediate control and supervision when he was aboard the vessel (R. 576).

The vessel owned by Yeiser was a cruising houseboat yacht powered by twin gasoline motors (R. 1, 28, 33). The petitioners, two young ladies, were guests on board the houseboat for a week end cruise (R. 2, 28, 33). They were at all times within the territorial limits of the State of Florida (R. 58, 59, 609-621). The petitioners had been assigned to and were occupying a double stateroom at the stern of the vessel, directly above the bilge, through which ran the exhaust pipes from the vessel's engines (R. 830, 831, 864). They were discovered in an unconscious condition in their beds and suffered personal injuries as a result of carbon monoxide gas escaping into their stateroom (R. 64, 65, 91, 521, 830, 831, 864).

Five days after the petitioners were injured, Yeiser died from causes unconnected with the accident (R. 28, 33, 78). The petitioners thereafter filed claims against his estate for damages as a result of the injuries received by them (R. 3, 28, 34). The executrix of Yeiser's estate then filed her petition in admiralty for limitation of liability upon the statutory ground that the injuries were

occasioned "without the privity and knowledge" of Yeiser (R. 2) and alternatively prayed for exoneration on the ground that the accident was unavoidable (R. 2). The petitioners answered, denying the right to limitation or exoneration, asserting that their injuries were a direct and proximate result of Yeiser's negligence (R. 30, 31, 36) and praying for personal judgments against his estate (R. 31, 37).

The cause came on for trial, solely upon the issues of liability and the right to limit liability (R. 44, 45).

At the conclusion of the trial, the executrix, among other things, contended, *for the first time,* that if Yeiser did injure the petitioners, his personal liability ended with his death, and that the only liability which could exist is the liability of the vessel *in rem*, notwithstanding that under the law of Florida (statutory and common), such causes of action survive the death of the tort-feasor (R. 822).

The District Judge entered his written opinion (R. 819-824) and later his decree (R. 825-835) embodying findings of fact and conclusions of law, finding that as a direct and proximate result of Yeiser's negligence, the petitioners were injured by breathing carbon monoxide gas which had collected in the stateroom assigned to them by Yeiser; that the injuries were occasioned with the privity and knowledge of Yeiser (R. 819-824, 831, 832); that exoneration of liability and the right to limit liability should be denied (R. 822, 833); that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the statute and common law of Florida providing that the cause of action shall survive will be enforced in a court of admiralty (R. 822, 834); that the subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper har-

mony of that law in its international or interstate relations and that, therefore, as a matter of law, the causes of action *in personam* did not abate by reason of Yeiser's death.

From this decree for petitioners, an appeal was taken by the executrix to the Circuit Court of Appeals for the Fifth Circuit (R. 857). In a written opinion, reported in 113 F. 2d, page 105, that Court unanimously approved the findings of fact (R. 864) made by the District Judge (R. 825, 835) and affirmed the decree in so far as it held that Yeiser was guilty of negligence and that the injuries were occasioned with his privity and knowledge (R. 865). A majority of the Court, however, consisting of Judges Sibley and Foster, reversed the decree of the District Court in so far as it held that the personal liability of Yeiser survived his death as a result of the statutory and common law of Florida (R. 868). The majority held that a personal right of action abates upon the death of the wrongdoer under the common law "and that there are admiralty precedents to the same effect" (R. 865); that, therefore, no effect can be given to the statutory and common law of Florida providing that the death of a tort-feasor does not extinguish a right of action for personal injuries (R. 867, 868) and that "uniformity requires it to be so" (R. 867). Circuit Judge Hutcheson, in a written opinion (R. 868-873), dissented from the latter holding on the ground that there is no "Federal general law" or "any traditional maritime law" applicable to this case (R. 869) which prevents giving effect to the Florida rule and that since the action has no relationship to navigation "there is no necessity for uniformity" (R. 871).

IV.

SPECIFICATIONS OF ERROR.

1. The said Circuit Court of Appeals erred in finding and holding that the common law with respect to abate-

ment of actions *in personam* has been adopted as part of the general maritime law and cannot be modified or supplemented by the common law and statutes of a state providing for survival of such actions.

2. The said Circuit Court of Appeals erred in finding and holding that petitioners' respective causes of action against the yacht owner, Yeiser, *in personam* abated as a result of the death of Yeiser prior to the filing of the petition seeking to exonerate his estate from liability or to limit that liability.

3. The said Circuit Court of Appeals erred in finding and holding that, although personal injuries are negligently caused with the privity and knowledge of a shipowner upon waters within the territorial limits of a State, and the tort-feasor shipowner thereafter dies, and the statutory and common law of the State provide that the cause of action for such injuries shall survive—nevertheless, such cause of action abated upon the tort-feasor's death, and cannot be enforced *in personam* by an admiralty court in a proceeding instituted by the deceased tort-feasor shipowner's executrix seeking to limit liability.

4. The said Circuit Court of Appeals erred in finding and holding that with regard to its effect upon any characteristic feature of maritime law, there is a distinction between a death act and a survival statute and that "decisions about death claims sustained in admiralty are not at all in point."

5. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, a State statute providing that the cause of action for such injuries shall survive will be enforced in a proceeding in admiralty to limit liability.

6. The said Circuit Court of Appeals erred in not finding and holding that where personal injuries are negligently caused upon waters within the territorial limits of a State and the tort-feasor thereafter dies, the subject is maritime and local in character, and that the specified modification of, or supplement to, the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

7. The said Circuit Court of Appeals erred in finding and holding that no effect could be given to the Florida statute and common law providing for survivorship of actions *in personam*; that petitioners' causes of action *in personam* had abated; that the decree of the District Court denying limitation of liability should be reversed; and that limitation of liability should be decreed.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

POINT A. The decision of the Circuit Court of Appeals, that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and cannot be modified or supplemented by a State survival statute, is contrary to and in conflict with prior applicable decisions of this Court.

POINT B. The majority decision refusing to give effect to the Florida statute and common law providing for survivorship of actions for personal injuries because to do so would impair the uniformity of admiralty is in conflict with applicable decisions of this Court and is erroneous.

POINT A.

The Decision of the Circuit Court of Appeals, That the Common-law Rule "Actio Personalis Moritur Cum Persona" Has Been Adopted As a Part of the General Maritime Law and Cannot Be Modified or Supplemented by a State Survival Statute, Is Contrary to and in Conflict with Prior Applicable Decisions of This Court.

Congress has not enacted any law as to the survival of actions in personal injury cases arising on navigable waters of a State. The majority decision of the Circuit Court of Appeals, upon the authority of *Crapo* v. *Allen*, Fed. Cases No. 3360, and *In re Statler*, 31 F. 2d 767, reversed the trial court and held that the common law rule that a personal right of action abates upon the death of either party is also the established general maritime law (R. 866, 867-869), thereby excluding the enforcement of

the statutory and common law of Florida providing for the survival of such actions. It is our contention that the majority decision is erroneous and in conflict with prior applicable decisions of this Court.

The common-law rule that a cause of action for personal injuries is extinguished by the death of either the injured person or the tort-feasor did not emanate from the ancient maritime codes and has never been peculiar to the maritime law as administered by nations generally. On the contrary, this doctrine of substantive law had its origin in England in the technical rule expressed in the maxim that a personal action dies with the person: "*actio personalis moritur cum persona.*" As such it was recognized and applied by the English maritime courts. The leading Continental nations had no system of common law courts. In other European countries the contrary legal doctrine is so well established as to be there applied in cases arising on land and sea alike. See Hughes on Admiralty (2nd Ed.), page 226.

It was long a question in this country whether the harsh common-law rule would be recognized or applied by our admiralty courts. Some of the District Judges, when the question came before them, in early cases, decided that the common-law doctrine was not consonant with natural justice and did not govern the admiralty courts (*Sea Gull*, Fed. Cases No. 12578; *Highland Light*, Fed. Cases No. 6477). There they sustained suits for wrongful death when brought by the widow and child.

All doubts as to the rule to be applied by our admiralty courts, in the absence of statute, were finally set at rest by the decision of this Court in *The Harrisburg*, (1886) 119 U. S. 199. In that case it appeared that a collision had occurred between the schooner Tilton and the steamer Harrisburg, a Pennsylvania vessel, in Massachusetts waters. The mate of the Tilton was killed and his widow and child libeled the steamer. Both States had statutes giving a right of action but these were held inap-

plicable, as the libel had not been brought within the time required by those statutes. The question whether a suit in admiralty could be maintained to recover damages for wrongful death, in the absence of an Act of Congress or State statute, was squarely presented.

Mr. Chief Justice Waite, after reviewing all of the earlier decisions, *in the absence of a State statute to the contrary*, followed the common law, saying (119 U. S., at 213):

> "* * * But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and *the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched*. It is not mentioned in the laws of Oleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx., nor in the Marine Ordinance of Louis XIV, 2 Pet. Adm. Dec. Appx.; * * *. *Since, however, it is now established that in the Courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule* for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. *The rights of persons in this particular under the maritime law of this country are not different from those under the common law*, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule" (Emphasis ours).

The next time this Court had occasion to pass upon the matter was in *The Corsair*, (1892) 145 U. S. 335. In that case a libel *in rem* had been filed by the parents of a passenger killed by negligence of the steamer in Louisiana waters. The claim was based upon the Louisiana Code providing for the survival of such actions. The question whether the admiralty courts will entertain a

libel *in rem* for loss of life where by local law the right of action survives but no lien is created was squarely presented. This Court, by Mr. Justice Brown, in holding that since the statute gave no remedy *in rem* the libel should be dismissed for lack of jurisdiction, reviewed the case of *The Harrisburg*, and said (145 U. S., at 344):

> "* * * Subsequently in the case of *The Harrisburg*, 119 U. S. 199 (30:358), it was held that in the absence of an Act of Congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being, caused by negligence. *This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law* in the *Mobile L. Ins. Co.* v. *Brame*, 95 U. S. 754 (24:580)" (Emphasis ours).

The opinion indicates that an action *in personam* could have been sustained.

After *The Harrisburg* a conflict arose as to whether a single State could by statute change the common-law rule and create a liability enforceable in admiralty. In that chaos of contrary rulings the Honorable Addison Brown, a most experienced judge, then presiding in the District Court of New York, reviewed the precedents and, in an opinion of notable perspicacity and erudition, enforced the New York death statute giving damages for death by negligence, under a libel *in personam*, where the death occurred on the navigable waters of the State; *The City of Norwalk*, (1893) 55 Fed. 98. Like the instant case, the argument was made that there could be no recovery in the cited case for loss of life because there was no liability therefor under the general maritime law and it was not competent for state legislation to change the law in maritime cases (see text 55 Fed. 103). Judge Brown found the argument to be without merit, saying, among other things (text 107, 112):

"Still further, it must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns, maritime transactions. The general body of the law as regards the ordinary, fundamental rights of persons and property, whether on land or sea, is, as observed by Mr. Justice Field in the passage above quoted, derived from the constituted order of the state, *i. e.*, from the municipal law, which courts of admiralty to a considerable extent must necessarily adopt and follow, subject only to the modifications which the special characteristics of the law of the sea impose on maritime subjects. These general rights and regulations of persons and property are subject to the control of the state and may be changed as the state sees fit, if they are not regulated by congress and do not trench upon its exclusive authority. * * *

"It was upon the recognition of this principle alone, as I understand, that in the case of *The Harrisburg*, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, *because there is no rule on this subject belonging specially to the maritime law as such.* '*It (the maritime law) leaves the matter untouched.*' Page 213, 119 U. S., and page 146, 7 Sup. Ct. Rep. And since the maritime courts in each country follow their own municipal law as regards giving damages for death; and inasmuch as by the common law of this country such a cause of action does not survive—the latter rule must, therefore, obtain in our courts of admiralty. In other words, *it is the municipal law that* on such a point *determines the law applicable in a court of admiralty* (Emphasis ours).

* * * * * * *

"In the case of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, the libel was dismissed, not be-

cause of any lack of jurisdiction, but because of the absence of any act of congress creating the right; and because 'the maritime law, as accepted and received by maritime nations generally, *leaves the matter untouched,*' and the subsequent absence of any distinct rule in the maritime code; and therefore the courts of admiralty, it was held, must take their rule on that subject from the municipal law. *From that decision it necessarily follows that within the sphere in which the municipal law is valid and operative, viz., within the navigable waters of the state, the state law, in the absence of any act of congress, as to the survival of any such right of action, or any distinctively maritime rule applicable to the case, must furnish the rule of law as to the right of recovery.* And this in effect is precisely what was said and applied in the case of *The Corsair*" (Emphasis ours).

Likewise, the Honorable William H. Taft, then a Circuit Judge, with like reasoning, applied the death statute of Canada in a proceeding *in personam* where the death occurred upon Canadian waters (*Robinson* v. *Det. & C. Steam Nav. Co.*, (1896) 73 Fed. 883). In speaking of Judge Brown's opinion he said that "The authorities which he masses and the reasons which he arrays in support of his conclusions leave nothing to be desired" (Text 893).

The views expressed in *The Harrisburg* and *The Corsair* were inevitably followed by this Court in *Western Fuel Co.* v. *Garcia,* (1921) 257 U. S. 233, an admiralty suit to recover damages for negligent death. In that case this Court, by Mr. Justice McReynolds, again pointed out that (257 U. S., at 240):

"* * * At the common law no civil action lies for an injury resulting from death. *The maritime law as generally accepted by maritime nations leaves the matter untouched* and in practice each of them has applied the same rule for the sea which it maintains on land. *The Harrisburg,* 119 U. S. 204, 213, 7 S. Ct.

140, 30 L. Ed. 358; *The Alaska*, 130 U. S. 201, 209, 9 S. Ct. 461, 32 L. Ed. 923; *LaBourgogne*, 210 U. S. 95, 138, 139, 28 S. Ct. 664, 52 L. Ed. 973" (Emphasis ours).

The Court affirmed the power of the States to make some modifications or supplements and held that where death follows from a maritime tort committed upon navigable waters of a State whose statutes give a right of action therefor, a libel *in personam* would lie because the subject, while maritime, is local in character and would not work material prejudice to the characteristic features of the general maritime law nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. As a result it was held that the District Court had jurisdiction but that the action was barred by the State statute of limitation.

It seems clear from these decisions that as to the question whether or not a cause of action survives the death of the injured person or the tort-feasor, there is no rule that belongs especially to the maritime law as such. The question belongs to the general body of the municipal law which regulates the ordinary fundamental rights of persons and property on land and sea, and which underlies the maritime law as a basis of its administration.

In the absence of an Act of Congress or a statute of a state, it is the common law and not an independent existing system of maritime law which furnishes the applicable principles controlling abatement or survival of actions in admiralty. Whitlock, "A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Facts," (1908) 22 Harvard Law Review 403, 407, shows that "*actio personalis moritur cum persona*" was not part of the law of the Continental countries either afloat or ashore. Hughes on Admiralty (2nd Ed.), pages 224 to 227, is to the same effect. Mr. Justice Holmes has consistently pointed out the fact that the maritime law

"is not a *corpus juris.*" It has never been considered as a complete and all-inclusive body of substantive law distinct from and co-extensive with the common law itself. The maritime law may be, and often is, supplemented by the common law. Thus, as pointed out by Mr. Justice Holmes (244 U. S., at 220), common law principles were applied in *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, to sustain a libel *in personam* for personal injuries suffered while loading a ship.

Unlike the common law, the American maritime law is not derived from English jurisprudence but rather from the general maritime law adapted to our circumstances and molded by our practice (Benedict on Admiralty, 6th Ed., p. 9). As said by Mr. Justice Holmes, "there is no mystic overlaw" (*The Western Maid,* (1922) 257 U. S. 419). This explains why in *The Harrisburg,* this Court first held that in so far as the rule *"actio personalis moritur cum persona"* is concerned, each country followed the same rule for the sea as it did on land and, thereupon followed the common law in the absence of a State statute to the contrary. There being no special maritime rule and no statute, the maritime law was merely supplemented by the common law.

It has often been said that there is no general common law of the United States. *Wheaton* v. *Peters,* 8 U. S. (Pet.) 591; *Western Union Tel. Co.* v. *Call Pub. Co.,* 181 U. S. 92; *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, where it is said (304 U. S., at 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. *There is no federal general common law.* Congress has no power to declare substantive rules of com-

> mon law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The only inference is that, while Congress remains silent, the maritime law is supplemented by the common law, and in the United States that means the common law of the State. *Sherlock* v. *Alling,* 93 U. S. 99; *Taylor* v. *Carryl,* 20 U. S. (How.) 583. Even when admiralty has unquestioned jurisdiction; the commonlaw may have concurrent authority and the state courts concurrent power. *Schoonmaker* v. *Gilmore,* 102 U. S. 118.

Accordingly, while the general principles of admiralty law follow the common law in refusing to recognize any right of action in the absence of a state statute, the admiralty courts have given effect to the various death statutes of the different states without regard to whether the action was originally brought in the state court at common law (*American Steamboat Co.* v. *Chace,* 16 U. S. (Wall.) 522; *Sherlock* v. *Alling,* 93 U. S. 99) or in the federal admiralty court (*The Hamilton,* 207 U. S. 398; *La Bourgogne,* 210 U. S. 94; see *The Corsair,* 145 U. S. 335).

Merely because a state statute may affect a ship or subjects over which admiralty has jurisdiction does not invalidate it. There are many cases in which there are concurrent remedies in the state and admiralty courts. There can be no question of the right of a state to give a common-law action, even for a cause maritime by nature. Thus, as early as 1873, this Court, in *American Steamboat Company* v. *Chace,* 16 Wall. 522, a suit at common law for a death in the waters of Rhode Island caused by a marine collision, held the Rhode Island statute valid notwithstanding the argument that the cause of action was maritime by nature and that the statute was an infringement of the exclusive admiralty jurisdiction of the federal

courts. Mr. Justice Clifford suggested that enforcement of the State statute did no more than "take the case out of the operation of the common law maxim that personal actions die with the person."

In *Sherlock* v. *Alling*, 93 U. S. 99, decided four years later, an action at law was brought under the Indiana statute to recover damages for death upon the Ohio River. It was argued that by both the common law and the maritime law the right of action for personal torts dies with the person, that the statute which allowed actions for such torts when resulting in the death of the person injured, enlarged the liability of parties for such torts, and if applied to marine torts would impose a new burden on commerce. This Court, however, held the statute valid, saying (93 U. S., at.....):

> "* * * It only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. * * *
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> * * * * * * * * *
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> "* * * Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of state authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and *the laws of the State govern.* The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the Legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force up-

> on citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. * * *" (Emphasis ours).

Until the decision in *The Hamilton,* 207 U. S. 398, in 1907, no ruling had been made by this Court holding that a State could by statute abolish the common law rule and create such a liability enforceable in admiralty. That was a proceeding to limit liability for deaths from a collision at sea off the coast of Virginia. Both vessels were from Delaware, which had enacted a statute providing that actions for personal injuries shall not abate with the plaintiff's death, and providing a right of action if the plaintiff dies before suit. It was argued on behalf of the shipowner that the relations of the parties should not in admiralty be regarded as fixed by the laws of a State where the injury occurs upon the open sea through a purely marine tort, and that the liability for wrongs committed outside of territorial waters should be decided by the rules of admiralty as administered by the Federal forum, which gives no damages for death. And it was further urged that no State can by legislation destroy the harmony and uniformity of the Federal maritime law.

The arguments in *The Hamilton, supra,* and in *Sherlock* v. *Alling, supra,* are, in many respects, identical with the argument relied upon by the Respondent in the case at bar. But notwithstanding the argument in *The Hamilton* case, the District Court, the Circuit Court of Appeals and this Court each successively ruled in favor of the validity and enforceability of the statute. When the case was before the Circuit Court of Appeals, that Court gave effect to the Delaware statute, saying (146 Fed. 727):

> "We cannot doubt that had suits been brought for these deaths in the courts of Delaware the plaintiffs would have succeeded. By the action of the petitioners they are enjoined from prosecuting their

claims in the home forum and are compelled to present them here.

"Every consideration based on equity and natural justice impels us to hold that it was not the purpose of the limited liability act to enable vessel owners to force claimants into the admiralty, and thus avoid claims which are valid and enforceable at common law. The intent was to limit the liability, not to destroy it" (Emphasis ours).

Thereafter, certiorari was granted. This Court, in an opinion by Mr. Justice Holmes, affirmed that decision and its reasoning, saying (207 U. S. 398, at 404):

"* * * The doubt in this case arises as to the power of the states where Congress has remained silent.

"That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789 (1 Stat. at L. 77, Ch. 20, Sec. 9), 'saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it' (Rev. Stat., Sec. 563, Cl. 8, U. S. Compt. Stat., 1901, p. 457), leaves open the common-law jurisdiction of the state courts over torts committed at sea. This, we believe, always had been admitted. *Martin* v. *Hunter*, 1 Wheat. 304, 337, 4 L. Ed. 97, 105; *The Hine* v. *Trevor* (*The Ad-Hine* v. *Trevor*), 4 Wall. 555, 571, 18 L. Ed. 451, 456; *Leon* v. *Calceran*, 11 Wall. 185, 20 L. Ed. 74; *Manchester* v. *Massachusetts*, 139 U. S. 240, 262, 35 L. Ed. 159, 166, 11 Sup. Ct. Rep. 559. And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature."

Although the Death on the High Seas Act of March 30, 1920, Ch. 111, 46 U. S. C. A., Secs. 761-768, has superseded some of these decisions, the principle they establish has never been repudiated. The Act does not alter the prior law in so far as the Great Lakes and the territorial

waters of the States are concerned; but, by its own terms, the Act expressly excludes its operation within State waters (For further discussion, see *infra*, page 20). The law of the place where the injury occurs determines whether or not the claim for damages survives. *Ormsby* v. *Chace*, 290 U. S. 387. See also the American Law Institute Restatement of "Conflict of Laws," Section 404, where under the heading "Tort in Territorial Waters," the rule is stated to be that:

> "Liability for an alleged tort committed on board a vessel while the vessel is in the territorial waters of a state is determined, except as stated in Section 405, by the law of that state."

The mere fact that this law is declared by the highest court in a decision, rather than by the Legislature in a statute, is not a matter of Federal concern. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

In Florida (by common law and by statute) a cause of action for personal injury *survives* the death of either the party injured or the tort-feasor. See Acts of Florida, Nov. 23, 1828, Sec. 30, being Sec. 4211, C. G. L., 1927; *Waller* v. *First Savings & Trust Co.*, (1931) 103 Fla. 1025, 138 So. 780; *Granat* v. *Biscayne Trust Co.*, (1933) 109 Fla. 485, 147 So. 850; *Penn* v. *Pearce*, (1935) 121 Fla. 3, 163 So. 288; *International Shoe Co.* v. *Hewitt*, (1936) 123 Fla. 587, 167 So. 7; and *State* v. *Parks*, (1937) 129 Fla. 50, 175 So. 786.

It is well known that State statutes giving a right of action for wrongful death fall under two classes. One class recognizes the rights of the *deceased* to sue for the injury inflicted and provides that such right of action shall survive, thus simply abolishing the common-law rule. These are called "survival acts." The other class gives a new right of action to *the parties injured by the death*, such as dependents, for the loss to them. These are called "death acts."

The right to enforce either a survival act or a death act, in admiralty, is now so well settled as to admit of no argument. *Vancouver S. S. Co.* v. *Rice,* (1933) 228 U. S. 445. We have been unable to find a single case where an admiralty court has refused to enforce a statute giving a remedy for wrongful death because it was a "survival statute" as distinguished from a "death act."

There is no distinction between a "death act" and a "survival statute" in so far as concerns the abolition of the common law rule "*actio personalis moritur cum persona*" and the effect of such statutes upon the maritime law.

At common law, and in the maritime law which in the absence of a statute followed the common (municipal) law, there *was no cause of action,* if, and after, either the injured person or the tort-feasor died. The cause of action abated upon the death of either party, and there was neither survival nor revival. It cannot be said that death acts did not invade the law in the field of personal injuries, since there can be no cause of action under the death acts unless the negligence was such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action and recover damages for his injuries. This Court has held in the case of a death act, giving a new action, that "the foundation of the right of action is the original wrongful injury to the decedent." *Michigan Central R. Co.* v. *Vreeland,* (1913) 227 U. S. 59. Death acts and survival acts both have a direct relationship to personal injuries and both provide a remedy for personal injury done to another. Neither can it be contended that death acts "do not modify" the existing maritime law which, in the absence of such statute, followed the common law. Before the passage of State "death" and "survival" acts there was no cause of action for wrongful death to be enforced. Likewise, there was no existing cause of action for personal injuries, if and after the tort-

feasor died. State death acts changed, modified and supplemented the common law rule, followed in admiralty, by *giving a cause of action* for wrongful death (with right to recover damages for such death and, in certain instances, the right to recover damages which the injured person might have recovered if he had lived) where none had existed before, or else providing for the survival of decedent's cause of action. The effect of State statutes providing for survival of causes of action for personal injuries (not resulting in wrongful death) must necessarily be to likewise supplement the common law rule followed in admiralty in the absence of such statute by giving a substantive right, enforceable by common-law remedy, where such right had not theretofore existed.

As shown by the cases herein cited, it is competent for the States to pass such statutes providing a remedy for personal injuries resulting in wrongful death, and they will be recognized and enforced in admiralty courts, without regard to whether they are death acts creating a new cause of action or survival acts continuing the original cause of action.

That the majority decision of the Circuit Court of Appeals is erroneous in refusing to give effect to the Florida statute is not only amply demonstrated by the cases already cited but also by the language of the Court in the case of *In re Long Island, etc., Transportation Co.*, (D. C. 1881) 5 Fed. 599. In that case, while limiting liability for wrongful death, the Court said (text 608):

> "It has been seriously doubted whether the rule of the common law, that a cause of action for an injury to the person dies with the person, is also the rule of the maritime law. There is some authority for the proposition that it is not, and that in admiralty a suit for damage in such a case survives. *The Sea Gull*, 2 L. T. R. 15; *Cutting* v. *Seabury*, 1 Sprague 522; *The Guldfaxe*, 19 L. T. R. 7480; *The Epsilon*, 6 Ben.

381. *But, however it may be in respect to the original jurisdiction of admiralty courts, I see no valid reason why the right of a person to whom, under the municipal law governing the place of the transaction and the parties to it, the title to the chose in action survives or a new right to sue is given for damages resulting from a tort, the admiralty courts, in the exercise of their jurisdiction in personam over marine torts, should not recognize and enforce the right so given.* It has been held by the Supreme Court that such legislation by a state as applied to marine torts does not, in the absence of a commercial regulation by Congress covering the same field, intrench upon the exclusive powers given to the general government. *Steamboat Co. v. Chase,* 16 Wall. 552". (Emphasis ours).

The Corsair, (1892) 145 U. S. 335, illustrates that a survival statute is valid and enforceable in an admiralty court. There the claim was based solely on the Louisiana Code providing for the survival of actions for injuries resulting in death. The libel was *in rem* and while the court affirmed a dismissal of the libel because the Louisiana statute gave only a remedy *in personam* and not a remedy *in rem,* nevertheless, in discussing the applicable law, this Court said (145 U. S., at 347):

"In much the larger class of cases, the lien is given by the general admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. *As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceeding in personam,* as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte McNiel,* (U. S.) 13 Wall. 237 (20:624), but unless a lien be

given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty" (Emphasis ours).

The Louisiana survival statute (which was considered in *The Corsair, supra*), giving to a survivor the right of action for the damages which the deceased might have recovered had he survived the injury, was later upheld and enforced *in personam* by the admiralty courts.

The Louisiana survival statute came before the court in *The Albert Dumois,* (1900) 177 U. S. 240, a proceeding for limitation of liability. The admiralty court upheld and enforced a claim for a wrongful death, based upon that statute.

In *Quinette* v. *Bisso et al.,* (1905) 136 Fed. 825 (certiorari denied 199 U. S. 606), the Circuit Court of Appeals for the Fifth Circuit recognized and enforced that survival statute of the State of Louisiana. The District Court had dismissed, on the ground of contributory negligence, a libel *in personam* to recover damages, brought under the Louisiana statute, resulting from the drowning of libelant's daughter. In reversing the lower court upon its finding of contributory negligence and directing entry of judgment for the libelant, the Circuit Court of Appeals recognized the State statute as giving the right of action, making contributory negligence a defense, if proved, and fixing the measure of damages to include those which the deceased might have recovered, saying (136 Fed., text 838):

> "The right of action here is given by Article 2315 of the Civil Code of Louisiana, as amended in 1884, which declares that:
>
> " 'Every act whatever of men which causes damages, obliges him by whose fault it happens to repair it; *the right of this action shall survive in case of death* in favor of the minor children or widow of the

deceased or either of them, and in default of these in favor of the surviving father and mother, or either of them, for a space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent and child, or husband and wife, as the case may be.'

"Without this statute the libelant could not maintain her libel. *The statute must be applied in admiralty just as if the suit had been brought in the state court,* and any defenses which are open to the defendant under the jurisprudence of the state, if successfully maintained, will bar recovery under the libel" (Emphasis ours).

It is noteworthy that in the Quinette case, the admiralty court not only adopted and enforced the State statute, but held that it was controlled by the decisions of the State courts in construing the statute; and, that the admiralty court adjudged in one lump sum the aggregate damages to be recovered, which included under the express terms of the statute "the damages which the deceased could have recovered had she survived the injury."

In holding (upon authority of the District Court cases of *Crapo* v. *Allen,* Fed. Cases No. 3360, and *In re Statler,* 31 F. 2d 767), that the common law principle "that causes of action for personal injuries die with the person" is also the general maritime law which cannot be modified or supplemented by a State survival statute, the Circuit Court of Appeals refused to follow, and conflicted with, the applicable decisions of this Court. Neither of the cases cited by the Circuit Court was in point. In the early case of *Crapo* v. *Allen, supra,* the injury for which suit was brought occurred upon the high seas and not in the territorial waters of Massachusetts. There was nothing to show (as in *The Hamilton, supra*) that Massachusetts was the State of the ship's flag. The general statements of District Judge Sprague in that case have not been sustained by subsequent cases and are directly contradicted

by *The Harrisburg, supra, The Corsair, supra, Western Fuel Co.* v. *Garcia, supra.* Furthermore as pointed out in *American Steamboat Co.* v. *Chace,* 16 U. S. (Wall.) 522, by Mr. Justice Clifford, "Judge Sprague also applied the same rule in the case of *Crapo* v. *Allen,* 1 Sprague 184, but in a later case he left the question open, with the remark that it cannot be regarded as settled law that an action cannot be maintained in such a case. *Cutting* v. *Seabury,* 1 Sprague 522."

The case of *In re Statler, supra,* is not in point and does not support the principle for which it was cited. The cited case, being a suit founded on the Seaman's Act, 41 Stats. 1007 (1920, 46 U. S. C. A. 688), is merely authority to the effect that where a cause of action is given by a Federal statute, the principles of the common law (not maritime law) will determine whether such action survives when nothing is said in the Statute itself about survivorship. See *Schreiber* v. *Sharpless,* 110 U. S. 76, and cases cited in the Statler opinion. The respondent asserts that this case holds "that the abatement took place by reason of the maritime law" (Br. 10) and that "Judge Knox's remarks with respect to the common law were made after he had already disposed of the case by reason of the maritime rule" (Br. 11). We most emphatically disagree with the respondent's construction of that case and submit that the opinion, when read as a whole, does not support such a statement. The case was squarely decided upon the following language (31 F. 2d, at 769):

> "The right of the representatives of the deceased seamen to claim damages for their deaths is original, and not derivative (*Michigan Central R. R.* v. *Vreeland,* 227 U. S. 59, 68, 70, 33 S. Ct. 192, 57 L. Ed. 417), and, as here asserted, came into existence merely as a result of the provisions of Section 20 of the Seamen's Act, as amended (46 U. S. C. A., Sec. 688). That statute, in terms at least, does not in-

dicate that, aside from the specific exceptions with which it deals, the causes of action which it authorizes shall be measured or characterized by any standard other than that of the common law. See *Willey* v. *Alaska Packers Association,* (D. C.) 9 F. 2d 937; *Sullivan* v. *Associated Billposters,* (C. C. A.) 6 F. 2d 1000-1004, 42 A. L. R. 503. Under the common law, it is familiar doctrine that an *ex delicto* action abates upon the death of the party charged with wrong and cannot be revived against his representatives. 1 Corpus Juris 163. See *Hegerich* v. *Keddie,* 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25, and *Matter of Meekin* v. *B. H. R. R. Co.,* 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635."

From this language, it is obvious that the case does not support the principle for which it was cited by a majority of the Circuit Court of Appeals and by the respondent here.

It is *significant to note* that the majority opinion of the Circuit Court of Appeals, while refusing to apply the principles announced in *The Harrisburg, supra, The Hamilton, supra, Western Fuel Co.* v. *Garcia, supra,* and other cases decided by this Court, upon the ground that "Decisions about death claims sustained in admiralty are not at all in point" (R. 866), nevertheless based its own contrary conclusion upon cases directly involving "death claims sustained in admiralty."

It is respectfully submitted that the majority opinion and the decision of the Circuit Court of Appeals that the common law rule "*actio personalis moritur cum persona*" has been adopted as a part of the general maritime law and therefore cannot be modified or supplemented by a State survival statute, is erroneous because it is contrary to and in conflict with the above cited decisions of this Court.

Reply to Respondent's Argument.

In an attempt to show the existence of a distinct general maritime rule that causes of action for personal injuries die with the person, the respondent (Br. 9) cites and relies upon *Cortes, Administrator,* v. *Baltimore Insular Line, Inc.*, (1932) 287 U. S. 267. This case does not aid the respondent. It was not a suit in admiralty but an action at law brought by the administrator of a deceased *seaman* under the provisions of the "Jones Act" to recover damages for his death alleged to have been negligently caused by the failure of the master to give the seaman proper care. The case dealt with the extent the ancient maritime rights of a *seaman* had been changed by the "Jones Act," which act gives a cause of action to a seaman who has suffered personal injury through the negligence of his employer, and if death results from such injury, gives a cause of action to the seaman's personal representative. As stated by this Court, the only question presented for decision was (287 U. S., at 372):

> "* * * We are to determine whether death resulting from the negligent omission to furnish care or cure is death from personal injury within the meaning of the statute."

The respondent next attempts to justify the reliance placed by the majority of the Circuit Court of Appeals upon the case of *In re Statler, supra,* and *Crapo* v. *Allen, supra* (Br. 10-15). We do not believe that these cases require any further discussion inasmuch as we have herein, *supra,* pages 25, 26, demonstrated that neither of these cases is in point.

The respondent attempts to overcome *The Harrisburg, supra, The Corsair, supra,* and *Western Fuel Co.* v. *Garcia, supra,* upon the supposed distinction that these cases "were cases involving causes of action for death" and "were not concerned with the abatement of maritime causes of action for personal injury" (Br. 19). Such

argument is untenable since it conclusively appears that there is no distinction between a death act and a survival statute in so far as concerns the abolition of the common law rule "*actio personalis moritur cum persona*" and the effect of both classes of statutes upon the maritime law.

Respondent argues that Congress, in passing the Death on the High Seas Act (Tit. 46, U. S. C. A., Secs. 761-768), occupied the field of survivorship; and by providing for revival of actions for wrongful death *upon the high seas* and by merely preserving state acts, Congress purposely excluded the operation of survival acts in state waters (Br. 22-26). This identical argument was also made to both the District Court and the Circuit Court of Appeals but was not adopted by either of them.

By its express terms, the federal death act is restricted to (1) "the death of a person," (2) "on the high seas beyond a marine league from the shore of any state" (Section 1); and (3) "the provisions of any state statute giving or *regulating rights* of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State * * *." This act *did supersede* state death statutes so far as they were applicable to *death on the high seas*—but the act itself excludes its operation within state waters and does *not attempt* to affect state statutes either *giving* or regulating (as by survival) actions for personal injuries resulting in a death upon navigable waters within the boundaries of a state. *Western Fuel Co.* v. *Garcia, supra.*

These matters are left as they stood prior to the passage of the act. *O'Brien* v. *Luckenbach S. S. Co.*, (C. C. A., 1923) 293 Fed. 170. There is nothing in the act itself to indicate that it was the intention of Congress to exclude all other remedies theretofore existing. *Powers* v. *Cunard S. S. Co.*, (D. C. N. Y., 1925) 32 F. 2d 720.

The act itself indicates a carefully devised congressional plan to leave unaffected the operation of state statutes over state waters. *Echavarria* v. *Atlantic, etc., Nav. Co.*, (D. C. N. Y., 1935) 10 Fed. Supp. 677.

It clearly follows that Congress has never, even partially, occupied the field of survivorship or revivorship of causes of action or actions where the personal injuries resulting in death occurred upon *state waters* as distinguished from those occurring *upon the high seas.* The result must, therefore, be that with respect to survivorship of all actions for personal injuries, including those injuries resulting in death, sustained on navigable waters within a state—the law of such state is operative and will be applied in admiralty.

Respondent argues that a situation analogous to the "High Seas Death Act" is found with respect to the "Employers' Liability Acts" and cites *St. Louis, etc., Railroad Co.* v. *Hesterly,* 228 U. S. 702 (Br. 25); *New York Central Railroad Co.* v. *Winfield,* 244 U. S. 147, and *Lingren, Administrator,* v. *United States et al.,* 281 U. S. 38 (Br. 26), holding that the failure of Congress to there provide for survival could not be aided by state laws. Those cases disclose that Congress in passing the "Employers' Liability Act" intended it to be *comprehensive and exclusive,* covering the entire subject of liability of a railroad to an employee in interstate commerce. The analogy is not supported. As we have shown, the Death on the High Seas Act does not purport to cover the entire field of personal injuries upon navigable waters, but is expressly limited to personal injuries resulting in death upon *the high seas*—thereby leaving undisturbed the operation of state statutes in territorial waters.

POINT B.

The Majority Decision Refusing to Give Effect to the Florida Statute and Common Law Providing for Survivorship of Actions for Personal Injuries Because to Do So Would Impair the Uniformity of Admiralty Is in Conflict with Applicable Decisions of This Court and Is Erroneous.

This Court has never decided whether admiralty courts will give effect to the statutory and common law of a State providing for survival of actions and permit enforcement of a claim *in personam* against a deceased tortfeasor's estate for personal injuries sustained upon the territorial waters of the State. Despite the importance of the question involved, there is no decision of any court (other than the case at bar) directly upon the point. There are, of course, many decisions of this Court holding that effect is to be given in admiralty to a State statute (some of which are "death acts" and some "survival acts") providing a remedy for wrongful death. The majority of the Circuit Court of Appeals held that these cases were not in point and refused to apply the principles announced in them (R. 866). No valid distinction exists between a death act and a survival statute as to the effect upon maritime law. The death cases decided by this Court are not only applicable to this case, but the principles therein announced control this controversy. The majority opinion and the decision of the Circuit Court of Appeals is untenable and in direct conflict with those decisions of this Court.

No State legislation is valid if it contravenes the essential purpose expressed by an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and unity of that law in its international and interstate relations. This Court has held that with respect to those activities directly connected with commerce and

navigation in their interstate and international aspects, the law must be uniform throughout the United States, and the various States may not modify or vary it. *Southern Pac. Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. The able dissents of four Judges in each of the above cases, led by Mr. Justice Holmes, clearly show, however, that the maritime law has not preempted the entire field of personal injuries but, on the contrary, State statutes applying a remedy where there was none before (as in the instant case) will be recognized and enforced in admiralty. It is well settled that though the contract or tort is maritime, yet, if it is local in character and has no direct relationship to navigation, State laws are applicable to determine rights and liabilities and to regulate the method of seeking relief because they do not work material prejudice to any characteristic feature of the maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Co.* v. *Rohde*, 257 U. S. 469; *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 51; *Carlin Constr. Co.* v. *Heaney*, 299 U. S. 41.

What is meant by a case *not* prejudicial "to any characteristic feature of the general maritime law" is expounded in the language of the decision in *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 51 (1926), as (270 U. S., at 64):

> "Regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

In the instant case the petitioners were not seamen (R. 2, 28, 33, 829). All of the parties were residing in Florida at the time, and the vessel was continuously at all times in State waters (R. 830). The captain and the engineer had their homes in Florida (R. 453), and Yeiser, the owner, lived aboard the vessel (R. 826). The vessel was docked at Miami, Florida, and Ft. Myers, Florida (R. 464). The trip was for pleasure and not for commerce. No fares were paid nor any money earned by operation of the yacht (R. 829). It does not appear that the vessel was engaged in commerce—interstate or of any other kind.

A tort action for wrongful death has no relationship to navigation, no characteristic features of maritime law are prejudiced thereby and there is no necessity for uniformity because the subject is local in character. Thus in *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, this Court in affirming the right to sue in admiralty to recover damages by virtue of a State death statute, said (257 U. S., at 241, 242):

> "In *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, we have recently discussed the theory under which the general maritime law became a part of our national law and pointed out the inability of the states to change its general features so as to defeat uniformity—but the power of a state to make some modifications or supplements was affirmed. * * *
>
> "As the logical result of prior decisions we think it follows that where death upon such waters follows from a maritime tort committed on navigable waters within a state whose statutes give a right of action on account of death by wrongful act, the ad-

miralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. *The subject is maritime and local in character* and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern Pacific Co.* v. *Jensen, supra*" (Emphasis ours).

Such holding that "*the subject*" (being personal injuries resulting in death by wrongful act upon State waters) *is maritime and* local in character, is equally applicable where the "*subject*" is "personal injuries from wrongful act upon State waters *not* resulting in death."

Such a conclusion was reached in *Buttner* v. *Adams et al.*, (C. C. A. 9, 1916) 236 Fed. 105, where, in reversing a decree of the lower court which had dismissed a libel to recover for personal injuries, the Court of Appeals said (text 108):

"While the admiralty jurisdiction cannot be enlarged by State enactment (*The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654), it is well settled that the maritime law may be changed by state enactment conferring rights of action arising out of marine torts resulting in death (*The Hamilton*, 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264; *LaBourgogne*, 210 U. S. 95, 28 S. Ct. 664, 52 L. Ed. 973). *Such being the case as to torts resulting in death, no good reason is seen why the admiralty court may not have jurisdiction of a cause to recover damages for personal injuries resulting from a marine tort against those whom the State law declares shall be primarily liable to respond in damages therefor.* * * * We hold that a liability so created by state law and arising out of a marine tort is subject to the jurisdiction of a court of admiralty. It is believed that this view of the question does not contravene any decision of a federal

court, or result in prejudice to the uniform administration of maritime law" (Emphasis ours).

Mr. Justice Holmes, in *The Hamilton*, 207 U. S. 398 (*supra*, pp. 18-19), has permanently and adequately disposed of any concern over interference with uniformity, saying (207 U. S., at 405):

"We pass to the other branch of the first question—whether the state law, being valid, will be applied in the admiralty. Being valid, it created an *obligation*—a personal liability of the owner of the Hamilton to the claimants. *Slater* v. *Mexican Nat. R. Co.*, 194 U. S. 120, 126, 48 L. Ed. 900, 902, 24 Sup. Ct. Rep. 581. This, of course, the admiralty would not disregard, but would respect the right when brought before it in any legitimate way. *Ex parte McNiel*, 13 Wall. 236, 243, 20 L. Ed. 624, 626. It might not give a proceeding *in rem*, since the statute does not purport to create a lien. It might give a proceeding *in personam*. *The Corsair* (*Barton* v. *Brown*), 145 U. S. 335, 347, 36 L. Ed. 727, 731, 12 Sup. Ct. Rep. 949. *If it gave the latter, the result would not be, as suggested, to create different laws for different districts. The liability would be recognized in all. Nor would there be produced any lamentable lack of uniformity.* Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit" (Emphasis ours).

No distinction in principle and reasoning from the point of view of uniformity can be made between a survival statute and a wrongful death statute of which Mr. Justice Holmes was speaking. Nevertheless, in the instant case, the majority opinion of the Circuit Court of Appeals refused to recognize or follow either the reasoning of Mr. Holmes or the later decision of this Court in *Western Fuel Co.* v. *Garcia*, *supra*, pp. 13, 33.

The opinion of the trial judge in the present case (R. 823) illustrates and follows the reasoning of the authorities here cited. Judge Holland said:

"As to a conflict with the uniformity required by the United States Constitution in regard to admiralty matters, I do not think the point is well taken because such uniformity is no more stricken down by a survivorship statute in regard to personal injury damages than by recognition of the right of action for death. In other words, if there is a statute in Florida, which there is, giving rise to a new action for death, and should there be no such statute in another state, for instance, South Carolina, certainly there would be a lack of uniformity there, yet that lack of uniformity is not held to be in conflict with the constitution. Likewise the survivorship of a personal injury damage is recognized by a Florida statute, and suppose the same is not recognized by a South Carolina statute. The same lack of uniformity exists, but in my opinion this lack of uniformity is not in conflict with the constitutional provisions of uniformity required of admiralty."

Another trial judge in an earlier case stated and applied the rule in admiralty, as announced by Mr. Justice Holmes. See *Amoth* v. *United States et al.*, (D. C. Ore., 1925) 3 F. 2d 848.

As to its effect upon any characteristic feature of the maritime law, there is no distinction between a death act and a survival statute. It clearly appears from the cases cited herein that a state may pass a statute providing a remedy for personal injury resulting in wrongful death and that such statute will be enforced in a court of admiralty, without regard to whether it is a death act creating a new cause of action or a survival act continuing the same cause of action. See also *The City of Belfast*, (D. C. Penn., 1905) 135 Fed. 208, where the Court held that the Pennsylvania statute involved in that case merely continued a common law right of action for personal injury after the plaintiff's death and hence, under such statute, a libel in admiralty against a ship for injuries did not abate upon the libelant's death but might

be continued in the name of his personal representative.

From the decisions of this Court, it is seen that no violation of uniformity of maritime law is involved in giving effect to the Florida common law and statute under which petitioners' causes of action for personal injuries survived the death of the tort-feasor, Yeiser. The cause of action *in rem* against the yacht was not affected by the death of its owner (*The Ticelene*, 208 Fed. 670). There also existed a cause of action against the owner in his lifetime. The Florida common law and statute make no attempt (as in death cases) to introduce into admiralty a new and strange kind of cause of action. On the contrary they merely preserve and confirm to injured persons, notwithstanding the death of the tort-feasor, the identical cause of action which maritime law, as well as the common law of Florida, gave to such persons, so that courts of admiralty, following the Florida common law and statute, may continue to enforce such causes of action.

Precisely the same reasoning and argument used by the deceased tort-feasor's executrix here, and adopted by the majority of the Circuit Court of Appeals in refusing to give effect to the Florida law, was advanced against the enforcement of State death acts, in *Sherlock* v. *Alling*, 93 U. S. 99. There, this Court, as early as 1876, held such reasoning and argument to be untenable and entirely devoid of merit.

Here the petitioners were already asserting their common-law remedy for the enforcement of their causes of action against the estate. They have never invoked the admiralty jurisdiction nor asserted a maritime lien against the yacht but were forced into the admiralty court by the petition of the executrix for limitation of liability (which was strictly a defensive maneuver) and they were not only forbidden to go elsewhere but were commanded to file their claims in season or else get nothing. The limitation proceeding, however, was one essentially *in rem*

and *in personam*, binding the owner's property as well as his person and furnishing a complete remedy for all claims, whether strictly in admiralty or not; *Hartford Accident & Indemnity Co.* v. *Southern Pac. Co.*, 273 U. S. 207. Having once acquired jurisdiction, both *in rem* and *in personam*, the admiralty court was competent to give petitioners a complete remedy not only against the yacht but also against the deceased tort-feasor's estate.

The majority opinion and the decision of the Circuit Court of Appeals, in refusing to give effect to the Florida law, have refused to recognize the above cited applicable decisions of this Court, and by so doing have reached a decision which is erroneous and which directly conflicts with those decisions of this Court.

Reply to Respondent's Argument.

The opinion of this Court by Mr. Justice Holmes in *The Hamilton*, 207 U. S. 398, *supra*, page 35, conclusively shows that the enforcement of a State survival statute will not produce such a lack of uniformity in the administration of the maritime law as to conflict with Constitutional requirements. Being unable to distinguish or otherwise answer this authority, the respondent here seeks to ignore that case and the principles of law there announced. We submit that *The Hamilton, supra*, controls the decision of this question.

Ignoring *The Hamilton, supra*, respondent argues: "We are concerned here with the right granted by the Federal maritime law, which depends on the Federal Constitution" and is in the nature of a Federal statute (Br. 27). From this fallacious premise respondent then argues that the survival of a cause of action must depend upon the will of Congress alone (Br. 29). The respondent completely overlooks the fact that at common law and in the maritime law following the common law there was no cause of action if and after either the in-

jured person or the tort-feasor died and that "no valid distinction from the point of view of uniformity can be made between a survival action and an action for wrongful death, of which the books are full. Here the injury occurred in the territorial waters of Florida and there can be no doubt that had a common law action been brought in Florida it could have been maintained. 2 C. J. S., Sec. 62, p. 124" (R. 871). The respondent also ignores the fact that even as to actions for wrongful death, some are based upon "death acts" giving a new right of action, and others are based upon State "survival acts" providing that the decedent's right of action shall survive. If there be any merit in respondent's argument, then State "survival acts" (such as the Louisiana statute) continuing the decedent's cause of action for wrongful injury resulting in death are unenforceable in admiralty. We have shown that the Louisiana survival act has been enforced in admiralty without question.

Respondent next attempts to distort our contentions, saying that our "absurd argument is constituted of two principles" and that we contend, first, that there is not a Federal maritime law, and, second, that therefore there cannot be any prejudice to its characteristic features or interference with its uniformity (Br. 29). We merely point out that we have not made any such contentions.

Respondent further contends that although State death acts are enforceable in admiralty there is "vital distinction" between a State death act and a State survival statute, the supposed distinction being that a death act creates a new right unknown to the maritime law, whereas survival statutes continue the same action (Br. 30, 31). This contention has been answered fully herein, *supra*, pages 20 and 21.

The respondent admits that: "However, if one assumes, as the petitioners do, that there is not an independent maritime rule of abatement of causes of action for personal injury, there is no problem, and there is, in-

deed, no difference between death statutes and survival statutes. If the rule applied in admiralty to abate personal causes of action is not a maritime rule but a rule of the common law, then, of course, any change in the rule is merely a change of the common law" (Br. 33). It is unnecessary to indulge such an assumption, inasmuch as we have shown in Point A, *supra*, pages 8 to 30. that the common law rule *"actio personalis moritur cum persona"* has never been adopted as a part of the general maritime law so as to exclude the operation of a State survival statute, and that a State statute abrogating such rule will be enforced in admiralty.

Respondent's assertion, "that actions for death have nothing to do with personal injuries," refutes itself; because, even in the case of a death act (as distinguished from a survival statute) "the foundation of the right of action is the original wrongful injury to the decedent." See *supra*, page 21, and *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59.

Respondent ends her argument upon this point by citing, and quoting from, *The Lafayette*, 269 Fed. 917, as "persuasive authority," and stating that we did not mention that case. We did not mention *The Lafayette*, because, first, it was urged at length upon the District Judge, who found specifically that the case did not sustain respondent's contentions; second, because the cited case was urged by respondent upon the Circuit Court of Appeals, but was not followed or mentioned by that Court; and, third, because the cited case is not in point and has no application here since it was a suit *in rem* against the vessel, as shown from the opinion, where it is stated (text 927):

> "The principle, however, that death before judgment abates an action for personal injuries has no application to the facts of this case, which is not a proceeding *in personam*, but one *in rem*."

CONCLUSION.

We submit, in the language of the dissenting opinion by Circuit Judge Hutcheson, that "Admiralty should not here follow the traditional common law rule of an action abating with the death of the wrongdoer in view of its almost universal disapproval in and disappearance from the jurisprudence of American states and particularly in view of the fact that there is now no general federal common law but only the common law of the state where the particular court is sitting. Particularly should we not follow this ancient and discredited rule, in the face of the considerations of humanity, of reason and of common sense, together with the current of authority which now runs in favor of its abolition" (R. 872-873).

Upon the record and the cited authorities, we respectfully submit that the majority opinion and the decision of the Circuit Court of Appeals are erroneous, in that they conflict with applicable decisions of this Court, and that the judgment of the Circuit Court of Appeals should be reversed.

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